

MARK J. BENNETT 2672
Attorney General of Hawaii

2007 AUG 21 AM 8:25

ROBYN M. KUWABE 3001
Deputy Attorney General
Department of Attorney
General, State of Hawaii
Labor Division
425 Queen Street
Honolulu, Hawaii 96813
Telephone: 586-1450

HAWAII LABOR
RELATIONS BOARD

Attorneys for Complainant NELSON B. BEFITEL,
Director of Labor and Industrial Relations

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. OSH 2007-18
)	(Inspection No. 310385653)
DIRECTOR, DEPARTMENT OF LABOR)	
AND INDUSTRIAL RELATIONS,)	STIPULATION AND SETTLEMENT
)	AGREEMENT; EXHIBIT A; APPROVAL
Complainant,)	AND ORDER
)	
vs.)	
)	
METCALF CONSTRUCTION)	
COMPANY, INC.,)	
)	
Respondent.)	

STIPULATION AND SETTLEMENT AGREEMENT

Complainant Nelson B. Befitel, Director of Labor and Industrial Relations
("Director") and Respondent Metcalf Construction Company, Inc. ("Respondent") having
reached a full and complete settlement of the above-captioned contested case presently pending
before the Hawaii Labor Relations Board ("Board") stipulate and agree as follows:

On or about October 17, 2006, the Director, by and through the State of Hawaii's
Occupational Safety and Health Division ("HIOSH"), inspected Respondent's workplace located

at Kulalani at Mauna Lani, Kamuela, Hawaii 96743.

As a consequence of said inspection, the Director, through HIOSH's Administrator, issued a Citation and Notification of Penalty on January 25, 2007 ("Citation") to Respondent alleging violations of the Hawaii Occupational Safety and Health Standards and assessed an aggregate penalty of \$6,250.00. *See* Exhibit A.

Respondent timely contested the Citation.

THEREFORE, to avoid the expense of litigation and to compromise and settle the above-captioned case, the parties, by and through their respective representatives, stipulate and agree as follows:

1. The Board has jurisdiction over this contested case pursuant to section 396-11, Hawaii Revised Statutes ("HRS").

2. At all relevant times, Respondent maintained a workplace at Kulalani at Mauna Lani, Kamuela, Hawaii 96743.

3. At all relevant times, Respondent was an employer, as defined in HRS § 396-3, and employed employees, as defined in HRS § 396-3, and was therefore subject to the requirements of HRS chapter 396, the Hawaii Occupational Safety and Health Law.

4. Respondent agrees that it has abated each violation listed in the Citation in compliance with the abatement requirements under Hawaii Administrative Rule § 12-51-22.

5. The Citation is amended as follows:

a. Citation 1, Item 1, 29 CFR 1926.501(b)(13) [Refer to chapter 12-121.2, HAR], is affirmed but its characterization is amended from Serious to Other than Serious.

b. Citation 1, Item 2a, 29 CFR 1926.451(g)(1) [Refer to chapter 12-130.1, HAR], is affirmed but its characterization is amended from Serious to Other than Serious.

c. Citation 1, Item 2b, 29 CFR 1926.452(j)(1) [Refer to chapter 12-130.1, HAR], is affirmed but its characterization is amended from Serious to Other than Serious.

d. Citation 1, Item 3, 29 CFR 1926.1053(b)(1) [Refer to chapter 12-154.1, HAR], and its corresponding characterization is affirmed.

6. The Director reduces the aggregate penalty from \$6,250.00 to \$3,125.00 which shall be paid in full to the Director of Budget and Finance upon the execution of this Agreement.

7. Respondent shall apply for and make a good faith effort to be recertified in the Department of Labor and Industrial Relations' "SHARP" program within thirty (30) days after the filing of this Agreement and shall be recertified as a SHARP company on or before ninety (90) days after the filing of this Agreement. Provided that if a written request for an extension of the deadline is submitted to the Director prior to the expiration of the ninety (90) day deadline, the Director may extend the ninety (90) day deadline if the inability to meet the deadline is attributable to HIOSH and not Respondent and Respondent has demonstrated that it has made a good faith effort to be recertified by the deadline. The Director's decision on whether to extend the deadline shall be final and unappealable.

8. Respondent shall provide the Director with written verification that it has trained all its employees in fall protection and scaffolding within thirty (30) days after the filing of this Agreement. The verification shall show the date of the training session, the topic of the training session, the name(s) of the employee(s) trained, and be signed by the person who conducted the training.

9. Respondent shall provide the Director with a copy of Respondent's policy for disciplining employees for failing to comply with HRS chapter 396, the Hawaii Occupational

Safety and Health Law, and the related rules within thirty (30) days after the filing of this Agreement.

10. If Respondent fails to fulfill any condition of this Agreement within the time stated, the characterizations of the citation that were reduced to Other than Serious along with the original aggregate penalty amount of \$6,250.00 shall automatically and without further notice be reinstated and shall be final and conclusive and shall be treated as such with regard to any future citations the Director may issue against Respondent including, but not limited to, any "repeat" violations. All amounts shall be immediately due and owing. If Respondent fails to pay all penalties and the Director institutes legal action to collect on the outstanding amount due, Respondent agrees to pay all fees and costs, including reasonable attorney's fees, incurred to collect on the unpaid penalties. Any forbearance by the Director in exercising any right or remedy shall not be a waiver of or preclude the exercise of any right or remedy.

11. Except for the stipulated amendments described above, the Citation is confirmed in all other respects and upon approval by the Board, this Agreement and the Citation, as amended, shall become a final order of the Director.

12. Respondent shall post a copy of this Agreement and Order in a prominent place at or near the location of the posting of the Citation, and the Agreement and Order shall remain posted for three working days (excluding weekends and State holidays).

13. Respondent shall continue to comply with HRS chapter 396, the Hawaii Occupational Safety and Health Law, and the related rules.

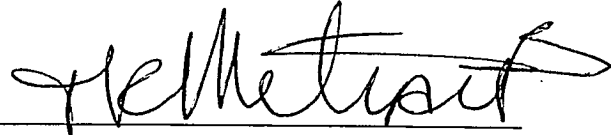
14. Nothing in this Agreement shall bar the Director from taking any action regarding future acts or practices by Respondent which may be alleged to violate HRS chapter 396, the Hawaii Occupational Safety and Health Law, or the related rules.

DATED: Honolulu, Hawaii,

7/27/07.

METCALF CONSTRUCTION COMPANY, INC.

By:
Its

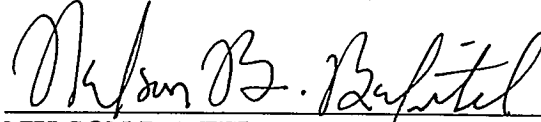

CEO.

APPROVED AS TO FORM:

DIRECTOR OF LABOR AND
INDUSTRIAL RELATIONS



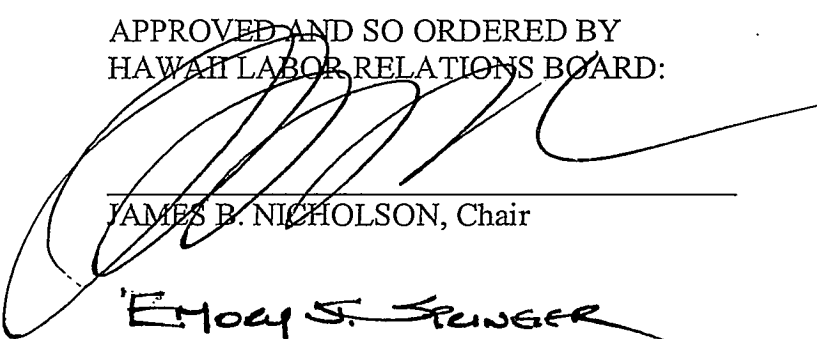
ROBYN M. KUWABE
Deputy Attorney General
Attorney for Director of Labor and
Industrial Relations, State of Hawaii


NELSON B. BEFITEL


APPROVED AND SO ORDERED BY
HAWAII LABOR RELATIONS BOARD:

ORDER NO. 259

DATED: August 21, 2007


JAMES B. NICHOLSON, Chair


EMORY J. SPRINGER, Member


SARAH R. HIRAKAMI, Member

State of Hawaii
Department of Labor and Industrial Relations
Hawaii Occupational Safety and Health Division
830 PUNCHBOWL STREET, ROOM 425
Honolulu, HI 96813
Phone: (808) 586-9110 FAX: (808) 586-9104



Certified Number: 7006 2150 0004 4122 0983

Citation and Notification of Penalty

To:
Metcalf Construction Co Inc
and its successors.
73-4273 Hulikoa Dr
Kailua-Kona, HI 96740

Inspection Number: 310385653 (Charles Clark)
Inspection Date(s): 10/17/2006 - 10/17/2006
Issuance Date: 01/25/2007
OSHSO ID: X8851
Optional Report No.: 09806
Inspection Type: Referral
Scope of Inspection: Partial Inspection

Inspection Site:
Kulalani at Mauna Lani
Kamuela, HI 96743

The violation(s) described in this Citation and Notification of Penalty is (are) alleged to have occurred on or about the date(s) of the inspection(s) made final on or after the date(s) within the description given below.

This Citation and Notification of Penalty describes violations of the Hawaii Occupational Safety and Health Law. The penalty(ies) listed herein is (are) based on these violations. You must abate the violations referred to in this Citation by the dates listed and pay the penalties, unless within 20 calendar days from your receipt of this Citation and Notification of Penalty, you mail a notice of contest to the State of Hawaii Occupational Safety and Health Division (HIOSH) at the address shown above. Please refer to the enclosed booklet (Employer Rights and Responsibilities Following a HIOSH Inspection) which outlines your rights and responsibilities and which should be read in conjunction with this form. Issuance of this Citation does not constitute a finding that a violation of the Law has occurred unless there is a failure to contest as provided for in the Law or, if contested, unless this Citation is affirmed by the Hawaii Labor Relations Board (HLRB) or a court.

Posting - The law requires that a copy of this Citation and Notification of Penalty be posted immediately in a prominent place at or near the location of the violation(s) cited herein, or, if it is not practicable because of the nature of the employer's operations, where it will be readily observable by all affected employees. This Citation must remain posted until the violation(s) cited herein has (have) been abated, or for 3 working days (excluding weekends and State holidays), whichever is longer. The penalty dollar amounts need not be posted and may be marked out or covered up prior to posting.

Informal Conference - An informal conference is not required. However, if you wish to have such a conference you may request one with the Administrator during the 20 calendar day contest period. During such an informal conference, you may present any evidence or views which you believe would support an adjustment to the citation(s) and/or penalty(ies).

If you are considering a request for an informal conference to discuss any issues related to this Citation and Notification of Penalty, you must take care to schedule it early enough to allow time to contest after the informal conference, should you decide to do so. Please keep in mind that a written letter of intent to contest must be submitted to the Administrator within 20 calendar days of your receipt of this Citation. The running of this contest period is not interrupted by an informal conference.

If you decide to request an informal conference, please complete, remove and post the page 4, Notice to Employees next to this Citation and Notification of Penalty as soon as the time, date, and place of the informal conference have been determined. Be sure to bring to the conference any and all supporting documentation of existing conditions as well as any abatement steps taken thus far. If conditions warrant, we can enter into an informal settlement agreement which amicably resolves this matter without litigation or contest.

Employers' Right to Contest - You have the right to contest this Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest penalties and/or abatement dates without contesting the underlying violations. Unless you inform the Administrator in writing that you intend to contest the citation(s) and/or penalty(ies) within 20 calendar days after receipt, the citation(s) and the penalty(ies) will become a final order of the Department of Labor and Industrial Relations and may not be reviewed by any court or agency. Once a letter of contest is received, it becomes the jurisdiction of the HLRB.

Penalty Payment - Penalties are due within 20 calendar days of receipt of this notification unless contested. Make your check or money order payable to "Director of Budget and Finance." Please indicate the Inspection Number on the remittance.

HIOSH does not agree to any restrictions or conditions or endorsements put on any check or money order for less than the full amount due, and will cash the check or money order as if these restrictions, conditions, or endorsements do not exist.

Notification of Corrective Action - For each violation which you do not contest, you are required by Section 12-51-22 to submit an Abatement Certification to HIOSH. The certification must be sent by you within 5 calendar days of the abatement date indicated on the citation. For **Willful and Repeat** violations, documents (example: photos, copies of receipts, training records, etc.) demonstrating that abatement is complete must accompany the certification. Where the citation is classified as **Serious** and the citation states that abatement documentation is required, documents such as those described above are required to be submitted along with the abatement certificate. If the citation indicates that the violation was corrected during the inspection, no abatement certification is required for that item.

All abatement verification documents must contain the following information: 1) Your name and address; 2) the inspection number (found on the front page); 3) the citation and citation item number(s) to which the submission relates; 4) a statement that the information is accurate; 5) the signature of the employer or employer's authorized representative; 6) the date the hazard was corrected; 7) a brief statement of how the hazard was corrected; and 8) a statement that affected employees and their representatives have been informed of the abatement.

The law also requires a copy of all abatement verification documents, required by Section 12-55-22 to be sent to HIOSH, also be posted at the location where the violation appeared and the corrective action took place.

Employer Discrimination Unlawful - The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Act. An employee who believes that he/she has been discriminated against may file a complaint no later than 60 days after the discrimination occurred with the Hawaii Occupational Safety and Health Division at the address shown above.

Employer Rights and Responsibilities - The enclosed booklet (Employer Rights and Responsibilities Following a HIOSH Inspection) outlines additional employer rights and responsibilities and should be read in conjunction with this notification.

Employees' Right to Contest - The law gives an employee or his/her representative the opportunity to object to any abatement date set for a violation if he/she believes the date to be unreasonable. The contest must be mailed to the Hawaii Occupational Safety and Health Division at the address shown above and postmarked within 20 calendar days of the receipt by the employer of this Citation and Notification of Penalty.

Inspection Activity Data - you should be aware that OSHA publishes information on its inspection and citation activity on the Internet under the provisions of the Electronic Freedom of Information Act. The information related to your inspection will be available 30 calendar days after the Citation Issuance Date. You are encouraged to review the information concerning your establishment at WWW.OSHA.GOV. If you have any dispute with the accuracy of the information displayed, please contact this office.



NOTICE TO EMPLOYEES OF INFORMAL CONFERENCE

An informal conference has been scheduled with HIOSH to discuss the citation(s) issued on 01/25/2007. The conference will be held at the HIOSH office located at 830 PUNCHBOWL STREET, ROOM 425, Honolulu, HI 96813 on _____ at _____. Employees and/or representatives of employees have a right to attend an informal conference.

STATE OF HAWAII
Department of Labor and Industrial Relations
Hawaii Occupational Safety and Health Division

Inspection Number: 310385653
Inspection Dates: 10/17/2006 - 10/17/2006



830 Punchbowl Street, Room 425
Honolulu, HI 96813

Issuance Date: 01/25/2007

Citation and Notification of Penalty

Company Name: Metcalf Construction Co Inc
Inspection Site: Kulalani at Mauna Lani, Kamuela, HI 96743

Citation 1 Item 1 Type of Violation: Serious

29 CFR 1926.501(b)(13) [Refer to chapter 12-121.2, HAR] was violated because:

- (A) Two employees working eleven feet above the lower level without any type of fall protection were exposed to serious injuries in the event of a fall to the lower level. The employees were observed installing window framing on September 29, 2006.
- (B) One employee working on a second floor lanai which was eleven feet above the lower level was not protected from fall hazards. The employee was subjected to serious injuries in the event of a fall to the lower level. Observed during the October 17, 2006 walk around inspection.
- (C) Two employees working on a second floor lanai which was eleven feet above the lower level were not protected from fall hazards. The employees were subjected to serious injuries in the event of a fall to the lower level. Observed during the October 17, 2006 walk around inspection.

29 CFR 1926.501(b)(13) states "Residential construction. Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of §§1926.502.

There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with §§1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems."

Location: (A) Bldg 20
(B) Bldg 24
(C) Bldg 21B

Date By Which Violation Must be Abated:
Penalty:

Corrected
\$1,375.00

See pages 1 through 3 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

STATE OF HAWAII

Department of Labor and Industrial Relations
Hawaii Occupational Safety and Health Division

Inspection Number: 310385653
Inspection Dates: 10/17/2006 - 10/17/2006



830 Punchbowl Street, Room 425
Honolulu, HI 96813

Issuance Date: 01/25/2007

Citation and Notification of Penalty

Company Name: Metcalf Construction Co Inc
Inspection Site: Kulalani at Mauna Lani, Kamuela, HI 96743

The alleged violations below (2a & 2b) have been grouped because they involve similar or related hazards that may increase the potential for illness or injury resulting from an accident.

Citation 1 Item 2a Type of Violation: Serious

29 CFR 1926.451(g)(1) [Refer to chapter 12-130.1; HAR] was violated because:

An employee working on a pump jack scaffold was not utilizing any type of fall protection which exposed the employee to serious injuries in the event of a fall to the lower level.

29 CFR 1926.451(g)(1) states "Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. Paragraphs (g)(1)(i) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold. Paragraph (g)(2) of this section addresses fall protection for scaffold erectors and dismantlers.

Note to paragraph (g)(1): The fall protection requirements for employees installing suspension scaffold support systems on floors, roofs, and other elevated surfaces are set forth in Subpart M of this part."

Location: Building 21

Date By Which Violation Must be Abated:
Penalty:

Corrected
\$3,500.00

See pages 1 through 3 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

STATE OF HAWAII
Department of Labor and Industrial Relations
Hawaii Occupational Safety and Health Division

Inspection Number: 310385653
Inspection Dates: 10/17/2006 - 10/17/2006



830 Punchbowl Street, Room 425
Honolulu, HI 96813

Issuance Date: 01/25/2007

Citation and Notification of Penalty

Company Name: Metcalf Construction Co Inc
Inspection Site: Kulalani at Mauna Lani, Kamuela, HI 96743

Citation 1 Item 2b Type of Violation: Serious

29 CFR 1926.452(j)(1) [Refer to chapter 12-130.1, HAR] was violated because:

A pump jack scaffolding system was not attached to the building with braces constructed of metal. The employee utilizing the scaffold was subjected to serious injuries in the event of scaffold bracing failure.

29 CFR 1926.452(j)(1) states "Pump jack brackets, braces, and accessories shall be fabricated from metal plates and angles. Each pump jack bracket shall have two positive gripping mechanisms to prevent any failure or slippage."

Location: Building 21

Date By Which Violation Must be Abated:

Corrected

See pages 1 through 3 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

STATE OF HAWAII
Department of Labor and Industrial Relations
Hawaii Occupational Safety and Health Division

Inspection Number: 310385653
Inspection Dates: 10/17/2006 - 10/17/2006



830 Punchbowl Street, Room 425
Honolulu, HI 96813

Issuance Date: 01/25/2007

Citation and Notification of Penalty

Company Name: Metcalf Construction Co Inc
Inspection Site: Kulalani at Mauna Lani, Kamuela, HI 96743

Citation 1 Item 3 Type of Violation: Serious

29 CFR 1926.1053(b)(1) [Refer to chapter 12-154.1, HAR] was violated because:


The extension ladders side rails were not extended 3 feet above the upper landing surface which subjected the employee using the ladder to gain access to a pump jack scaffold to serious injuries in the event of a fall to the lower level.

29 CFR 1926.1053(b)(1) states "When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support."

Location: Bldg 21

Date By Which Violation Must be Abated:
Penalty:

Corrected
\$1,375.00


NELSON B. BEFITEL
DIRECTOR

See pages 1 through 3 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

State of Hawaii
Department of Labor and Industrial Relations
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION
830 PUNCHBOWL STREET, ROOM 425
Honolulu, HI 96813

SUMMARY OF PENALTIES

Company Name: Metcalf Construction Co Inc
Inspection Site: Kulalani at Mauna Lani
Kamuela, HI 96743
Issuance Date: 01/25/2007

Summary of Penalties for Inspection Number 310385653

Citation 01, Serious = \$6,250.00

Make check or money order payable to the "Director of Budget and Finance." Please indicate the inspection number and dba, if company name is different, on the remittance. A fee of \$15.00 will be charged for any returned checks.

If receipt is desired, please indicate with payment; otherwise, your cancelled check will be your receipt.

2/15/07

U.S. Postal ServiceTM
CERTIFIED MAILTM RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

Safety Postage	\$.87
Certified Fee	2.40
Return Receipt Fee (Endorsement Required)	1.85
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$ 5.12

310385653
U.S. POSTAL SERVICE
HONOLULU, HI 96813

Sent To
Metcalf Construction Company, Inc.
Street, Apt. No.,
or PO Box No. 73-4273 Hulikoa Drive
City, State, ZIP+4 Kailua-Kona, Hawaii 96740

PS Form 3800, August 2006 See Reverse for Instructions

SECTION ON DELIVERY

Printed Name) my Steier
Date of Delivery 1/25/07

Address different from item delivery address below Yes No

Mail ☐ Express Mail
☐ Return Receipt for Merchandise
☐ C.O.D.
Delivery? (Extra Fee) ☐ Yes

4 4122 0783

102595-02-M-1540